MUST EVERY CIRCUMSTANCE NECESSARY FOR A CONVICTION BE PROVED BEYOND A REASONABLE DOUBT?

In line with the recent agitation over the great, and often unnecessary and unfair, handicap of technicalities against which the state must contend to convict a guilty person of his crime, comes the case of *State v. Blydenburgh,* 104 N. W. 1014 (Iowa). In that case—all the evidence that the accused poisoned his wife being circumstantial—the majority of the court hold that a refusal to give an instruction to the jury that "each fact in the chain of circumstances necessary to be established to prove the guilt of the accused, must be proven by competent evidence beyond a reasonable doubt," was not error, the jury having elsewhere been instructed that each of the *fact elements* of the crime must be proved beyond reasonable doubt. Thus the case stands as authority for the statement that while the state must prove the crime in its entirety, and also each constituent element of the crime beyond a reasonable doubt, yet every fact which, though not a distinct element of the crime, is nevertheless essential to a conviction, need not be so proved.

"There is a marked distinction," says Judge Deemer, in his dissenting opinion, "between an essential element of a crime and a fact or circumstance in a chain of circumstances essential to a conviction," and as an example of the latter he gives the rather unsatisfactory illustration, from the present case, of "how the poison came to be found in the stomach of the deceased." Now the above distinction is abstruse, but when he cautions to avoid Charybdis by distinguishing between "each link in the chain of circumstances relied on by the State" and "every circumstance or fact necessary for a conviction" (although this proposition must be admitted to be correct), it is hard to imagine that an ordinary jury, in the face of this double instruction would retire to the jury room with a very clear notion of what was expected of it.

Where the first of the above distinctions has been passed upon, nevertheless (although it is hard to determine whether such a distinction was really in the mind of the judges), the authorities are with Judge Deemer and Judge Weaver. In the celebrated case of *Commonwealth v. Webster,* 5 Cush. 319, Chief Justice Shaw, in the most careful of jury instructions, said: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred by competent evidence and by the same weight and evi-

dence as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof."

The instruction liable to be confounded with the one under discussion, is to the effect that though the jury is not sure as to the accused person's connection with some of the fact essentials of the crime, nevertheless, if it is convinced of guilt, as a whole, beyond a reasonable doubt, then it should find a verdict of guilty. Illinois is the only state that sustains this instruction. "The reasonable doubt the jury is permitted to entertain, must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case." *Mullins v. People,* 110 Ill. 42. *Lehigh v. People,* 113 Ill. 372. But in *Bressler v. People,* 8 N. E. 62, the judge, while ostensibly upholding these decisions, practically admits that the instruction was error, though in that case, "harmless." For the collected authorities on the point see the case of Dr. Graves. (32 Pac. 63.)

The great mistake in these instructions is the continued and unfortunate use, on the part of the trial judge, of the metaphor "link in the chain." To be sure, no chain is stronger than its weakest link, but the metaphor is usually inapplicable. This is especially true in the case of the second of the two distinctions given by Judge Deemer, to which the statement in *Leonard v. Territory,* 2 Wash. 381, that the different kinds of evidence to support a point were rather a crowd than a chain and that many could be absent without allowing escape, applies. The "cable" metaphor (*State v. Gleim,* 41 Pac. 1001) in which the circumstances which go to make up the ultimate facts and circumstances are the "strands," is true enough, but not altogether satisfactory in directing the mind of a jury. But the "link-and-chain" metaphor is almost universal, and as Judge Ladd remarks in *State v. Cohen,* 108 Ia. 208, "is extremely likely to be misunderstood by the jury."

The omission of it in the present case, and in many others, would have prevented much confusion.